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No. 96-93

In the Supreme Court of the United States

OCTOBER TERM, 1995

MARK G. LEVITOFF, ET AL., PETITIONERS

v.

DAN GLICKMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether this Court's decision in *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375 (1980), bars petitioners' attempt to impose Title VII liability on the United States Forest Service for its compliance with the orders of a court of lawful jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-18) is unpublished, but the decision is noted at 74 F.3d 1246 (Table). The opinion of the district court (Pet. App. 2-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1996. A petition for rehearing was denied on April 16, 1996. Pet. App. 19. The petition for a writ of certiorari was filed on July 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The named petitioners in this action represent a class of current or former male employees of the Pacific Southwest Region of the United States Forest

Service, which is located within the Department of Agriculture. They seek monetary and injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. Their suit challenged employment practices of the Secretary of Agriculture, taken pursuant to a consent decree in another action. That action, *Bernardi* v. *Yeutter*, Civ. Action No. 73-1110 SC (N.D. Cal.), settled claims of gender discrimination brought by a class of female Forest Service employees. The district court dismissed petitioners' suit, Pet. App. 2-10, and the court of appeals affirmed, *id.* at 11-18.

1. The named plaintiff in *Bernardi* was a female sociologist employed by the Pacific Southwest Region of the Forest Service. In 1973, she brought a Title VII action on behalf of herself and all other similarly situated female employees of the Department of Agriculture, alleging wrongful and discriminatory denial of promotion opportunities. Pet. App. 3. The parties agreed to a consent decree in 1979. *Ibid.* The consent decree covered Region Five of the Forest Service and the Pacific Southwest Forest and Range Experimentation Station, an administrative component of the Forest Service headquartered in Berkeley, California. *Ibid.* The long term goal of the decree was to eliminate "underrepresentation of women within each General Schedule job series represented within its work force and at each grade level therein." *Ibid.* This goal was to be achieved "to the greatest extent possible" through the implementation of an affirmative action plan. *Ibid.* The decree was to remain in effect for five years, until May 1, 1986, with the district court retaining jurisdiction for an additional six months. *Id.* at 4. Compliance with the decree was to be overseen by a Decree Monitor, who was

required to provide the court and the parties with a status report every six months. *Ibid.*

After two fairness hearings and the expiration of an appeals period, the district court approved the consent decree in 1981. Pet. App. 4. In 1988, in response to a motion brought by the *Bernardi* plaintiffs, the district court found the Secretary to be in contempt for failing to comply with the terms of the decree, and the court extended the terms of the consent decree for three years, until 1991. See C.A. Supp. E.R. 244-247 (magistrate's findings and recommendation), 263 (district court adopts magistrate's findings and recommendation); Pet. App. 4.

2. In 1990, petitioners filed a motion to intervene in *Bernardi* on behalf of a class of male Region Five employees. Pet. App. 4. They also filed a motion requesting a suspension of the consent decree. *Ibid.* The district court denied as untimely their request for injunctive relief and motion to intervene. *Id.* at 5. The court stated that "[t]he consent decree entered in this case July 1981 is valid." C.A. Supp. E.R. 315. The court of appeals affirmed. *Bernardi* v. *Yeutter*, 945 F.2d 408 (9th Cir. 1991) (Table) (*reprinted at* Pet. App. 20-23). The court noted that the male class had failed to show that it lacked knowledge of the female class action or of the consent decree, and that the class had therefore failed to explain convincingly the reasons for its delay. Pet. App. 22. On April 13, 1992, the district court approved final settlement of the *Bernardi* action, and the court suspended the decree's injunctive relief and the Decree Monitor's duties. C.A. Supp. E.R. 318-319.[1]

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[1] The 1993 date in the district court (Pet. App. 5) and court of appeals opinions (*id.* at 12) is erroneous.

3. Petitioners filed this action on October 13, 1992, after the *Bernardi* litigation had concluded. Petitioners alleged that they had been denied employment opportunities by the Forest Service on the basis of their sex. Pet. App. 55-56. They further alleged that their injuries were "part of a[n] intentionally administered pattern or practice of considering the gender of an applicant for any vacant position, and either refusing to consider male applicants, preferring female applicants or demanding from male applicants qualities, credentials, and experience not required of female applicants." *Id.* at 57.

4. The district court dismissed the complaint. Pet. App. 2-10. The court noted that petitioners "do not deny that the factual allegations underlying this action are virtually identical to the [earlier] unsuccessful complaint in intervention." *Id.* at 5-6; see page 3, *supra*. The court concluded that petitioners' suit was in substance "a challenge to the validity of the Decree." Pet. App. 6. Relying chiefly on this Court's decision in *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375 (1980), the court held that the Secretary's compliance with a lawful court order could not form the basis for Title VII liability. Pet. App. 6-8. The court rejected petitioners' reliance on *Martin* v. *Wilks*, 490 U.S. 755 (1989), stating that "[a]ny tension between *GTE Sylvania* and *Martin v. Wilks* was essentially eliminated by the passage of §108" of the Civil Rights Act of 1991, 42 U.S.C. 2000e-2(n).[2] Pet. App. 8.

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[2] Section 108 provides that "an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws

The district court also dismissed petitioners' complaint insofar as it alleged "that not all actions of the [respondent] that are complained of by [petitioners] were required to be taken under the *Bernardi* decree." Pet. App. 9. The court explained that those allegations were subject to dismissal both because petitioners had "failed to identify any actions taken by [respondent] which go beyond the scope of the *Bernardi* consent decree," and because petitioners "lack[ed] standing to argue that the Forest Service's actions went beyond the scope of" a decree to which they were not parties. *Ibid.*

5. The court of appeals affirmed. Pet. App. 11-18. Relying on *GTE Sylvania*, the court held that "[t]he Secretary's compliance with a court order is a complete defense to actions such as these, because the *Bernardi* court specifically upheld the validity of the decree and ordered the Secretary to comply with its terms upon penalty of contempt. As the district court correctly held, the Secretary was legally obligated and had no choice but to comply with the terms of the decree." *Id.* at 13. The court of appeals rejected the district court's determination that petitioners lacked standing to argue that the Forest Service's actions went beyond the requirements of the *Bernardi* decree. *Id.* at 14. The court agreed with the district court, however, "that none of the facts pled by [petitioners] here indicate that the government did anything except follow the consent decree. As such, the district court's dismissal of [petitioners'] complaint under the *GTE* standard is AFFIRMED." *Id.* at 15.

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may not be challenged" by a person who had actual notice of the prior proceeding and an adequate opportunity to intervene. 42 U.S.C. 2000e-2(n)(1)(A) and (B)(i).

ARGUMENT

Petitioners contend that this case is controlled by *Martin* v. *Wilks*, 490 U.S. 755 (1989), rather than by *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375 (1980). That claim does not warrant this Court's review. Because *Martin* has been superseded by statute, the question of how that case and *GTE Sylvania* are best reconciled is of no continuing importance. Petitioners' other claims lack merit. The petition should therefore be denied.

1. In *GTE Sylvania*, a federal district court in Delaware issued an order enjoining the Consumer Product Safety Commission (CPSC) from releasing to the public specific documents containing information about television-related accidents. 445 U.S. at 377-378. Two consumer groups, which were not parties in the Delaware action, had filed Freedom of Information Act (FOIA) requests for the documents with the CPSC. *Ibid.* The requesters filed suit in the United States District Court for the District of Columbia, seeking release of the records under the FOIA. *Id.* at 378.

In rejecting the requesters' arguments, this Court explained that the documents were not "improperly withheld," 5 U.S.C. 552(a)(4)(B), because the agency was subject at all times to the Delaware court's injunction. 445 U.S. at 386. The Court stated that it was "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *Ibid.* The Court emphasized that "the CPSC was required to obey the injunctions out of respect for judicial process." *Id.* at 387 (internal

quotation marks omitted). "To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the [FOIA]," the Court concluded, "would do violence to the common understanding of the term 'improperly' and would extend the [FOIA] well beyond the intent of Congress." *Ibid.*[3]

In *Martin*, the Court permitted plaintiffs to go forward with their Title VII challenge to employment practices undertaken pursuant to a consent decree approved by a federal district court. The Court held that the plaintiffs were not foreclosed from challenging the consent decree, explaining that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." 490 U.S. at 762. The Court recognized, however, that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, * * * legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Id.* at 762 n.2. Congress responded to the *Martin* decision by enacting Section 108 of the Civil Rights Act of 1991, which provides that an employment practice that im-

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[3] Consistent with the principles announced in *GTE Sylvania*, guidelines issued by the Equal Employment Opportunity Commission provide that "[p]arties are entitled to rely on orders of courts of competent jurisdiction * * * whether entered by consent or after contested litigation, in a case brought to enforce a Federal, State, or local equal opportunity law or regulation." 29 C.F.R. 1608.8. "The Commission interprets title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under title VII." *Ibid.*

plements a consent decree or other judicial order entered in an employment discrimination suit is not subject to challenge by persons who had actual notice of the prior proceedings and an opportunity to intervene. 42 U.S.C. 2000e-2(n); see note 2, *supra*; H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 54-55 (1991) (stating that *Martin* "affirmed Congress's power to adopt a 'special remedial scheme' balancing the rights of nonlitigants against the need for finality of judgments and prompt relief for discrimination," and explaining that the 1991 Act "responds to the [*Martin*] decision by adopting just such a remedial scheme").

2. In the court of appeals, the government argued that *GTE Sylvania* rather than *Martin* controlled the instant case.[4] The government stated that in the instant case (unlike in *Martin*) the Secretary was subject to court orders—*i.e.*, the district court's determinations that the Secretary was in contempt and that the consent decree should be extended—specifically requiring the decree's implementation. Gov't C.A. Br. 23 n.12. The government also asserted that the Court in *Martin*, although holding that plaintiffs' suit was not precluded, had "intimated no view that obedience to a court order would not (in accordance with *GTE Sylvania* and the EEOC guidelines [see note 3, *supra*]) provide a complete defense on the merits." Gov't C.A. Br. 23 n.12. The court of

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[4] The government did not argue that Section 108 applied of its own force to the instant case, which involves (at least in part) a challenge to employment practices that predated passage of the Civil Rights Act of 1991. The court of appeals stated that it "need not address the thorny issue of retroactivity of Section 108" in light of the government's decision not to rely on that provision. Pet. App. 15 n.2.

appeals agreed that "*GTE* is directly applicable, and forecloses [petitioners'] claims." Pet. App. 13.

3. The questions presented do not warrant review by this Court. In light of Congress's enactment of Section 108 of the Civil Rights Act of 1991, issues concerning the proper reconciliation of *GTE Sylvania* and *Martin* are of no continuing importance.[5] Petitioners also contend that their complaint alleges facts that fall outside the actions mandated by the *Bernardi* consent decree; or, in the alternative, that they should have been given the opportunity to amend their complaint to prove routine and pervasive discrimination against male employees not sanctioned by the *Bernardi* decree. See Pet. 20-24. The courts below correctly rejected those contentions. Pet. App. 9, 15. The complaint in this action is in both form and substance an attack on the validity and court-ordered implementation of the *Bernardi* decree. See Pet.

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[5] As a prospective matter, claims such as those raised by petitioners in the instant case will clearly be barred by Section 108. There is no merit to petitioners' contention (Pet. 24) that their claims fall within statutory "exceptions" to Section 108's coverage. As the court of appeals observed, the "argument that [petitioners] were not given a reasonable opportunity to object to the *Bernardi* consent decree is absurd" in light of the extensive proceedings covering a span of 17 years. Pet. App. 13; see 42 U.S.C. 2000e-2(n)(1)(B)(i)(I) and (II) (Section 108 applies where plaintiff had (1) "actual notice of the proposed judgment or order sufficient to apprise such person" of its likely consequences and (2) "a reasonable opportunity to present objections to such judgment or order"). Nor is there any basis for petitioners' suggestion (Pet. 24) that the *Bernardi* decree was tainted by collusion or fraud, that the decree and court orders were transparently invalid, or that dismissal of this action would deny petitioners due process of law. 42 U.S.C. 2000e-2(n)(2)(C) and (D).

App. 5-6 (district court noted that petitioners "do not deny that the factual allegations underlying this action are virtually identical to the [earlier] unsuccessful complaint in intervention"). Further review is not warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The two administrative decisions relied on by petitioners (Pet. 22-23) address only specific individual instances of discrimination, and do not demonstrate any routine practice or recurring and commonplace pattern of discrimination. Pet. App. 13 n.1. Indeed, those decisions demonstrate that the agency was actively policing itself to ensure that its implementation of the decree did not lead to discriminatory acts unsanctioned by the decree itself. Petitioners' additional claim that the courts below failed to require the government to prove its affirmative defense of complying with a court order (Pet. 25-28) ignores the entire *Bernardi* record, which was filed in this action to demonstrate to the courts below the scope of the decree and the relationship between its requirements and respondent's conduct.